APPENDIX A

United States District Court
Northern District of Georgia
Atlanta Division

Rockbridge Associates, Ltd., a Georgia Limited Partnership,

vs.

W. R. (Dudge) Pruitt, Julian W. Archer, Marion Buice, Ray W. Gunnin, and Carvis P. Williams, Individually and as Commissioners of Gwinnett County, Georgia; and Ralph Herrington Individually and as Chief Building Inspector of Gwinnett County.

Civil Action No. 14483

ORDER

(Filed in Clerk's Office September 30, 1971)

Plaintiff, a Georgia limited partnership, is the owner of a parcel of land in Gwinnett County, Georgia. A portion of plaintiff's property is presently zoned R-85 (residential); another portion is zoned C-2 (commercial). In June, 1970, plaintiff applied to the Gwinnett County Planning Commission to have the property rezoned to an RM (apartment) classification. Though the Planning Commission recommended approval of the rezoning request, the Gwinnett County Commissioners refused to follow this recommendation and the ap-

plication for rezoning was denied. The complaint alleges that the decision of the county commissioners violates plaintiff's equal protection and due process rights under the Fourteenth Amendment.[1] Specifically, it is alleged that (1) the decision of the County Commissioners was arbitrary, capricious, and amounted to a taking of property without due process in that it arbitrarily interfered with plaintiff's rights in and use of its property and deprived plaintiff of a major portion of the value of its property; (2) the decision of the County Commissioners was not based upon competent evidence establishing that the proposed rezoning was inconsistent with the objectives of the county's zoning resolution; (3) the decision of the Commissioners discriminated arbitrarily between plaintiff's property and property similarly situated; (4) plaintiff was denied certain procedural safeguards; and (5) the delegation of zoning authority by the State to local governing bodies denies citizens, who do not live within the County, the right to participate effectively in zoning matters, since they cannot vote for the County Commissioners.

Defendants have moved to dismiss the complaint for lack of jurisdiction and for failure to state a claim upon which relief may be granted. At plaintiff's request a hearing was held at which plaintiff candidly

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[1] Plaintiff's complaint couches its attack as an attack on portions of the zoning ordinance and zoning map of Gwinnett County. At the hearing in this case it clearly appeared that what plaintiff attacks is the decision of the County Commissioners which denied plaintiff's rezoning application. The attack may be viewed as directed toward the zoning ordinance and maps only insofar as they reflect the decision of the Commissioners.

clarified its contentions and the facts in this case. Upon considering the allegations of the complaint in light of the facts and contentions presented at the hearing, the court concludes that no substantial federal question is presented and the complaint must therefore be dismissed.

At the outset it should be noted that the federal district courts are courts of limited jurisdiction. It is not their function to serve merely as a zoning appeal board. The individual merits of local zoning matters are appropriately left to the sound discretion of local zoning authorities. This court is charged only with the responsibility of insuring that zoning decisions are not made in a manner which contravenes the mandates of the United States Constitution. Since the decision of local zoning authorities is an exercise of judgment legislative in character, these decisions are subject to judicial control only if arbitrary or if interested parties have been denied procedural due process. *Diedrich v. Zoning Commission of the District of Columbia*, 393 F.2d 666 (D.C.Cir. 1968); *Hot Shoppes, Inc. v. Clouser*, 231 F.Supp. 825 (D.D.C. 1964).

While it is true that the decision of local zoning authorities restricts the uses of certain property and in some instances may cause the property to be used for other than its most profitable use, these factors do not cause the decision to be unconstitutional, unless the decision is arbitrary. *Goldblatt V. Hempstead*, 369 U.S. 590 (1962); *City of St. Paul v. Chicago, St. Paul, M. & O. Ry.*, 413 F.2d 762 (8th Cir. 1969); *McCleskey v. Barrett*, 386 F.2d 159 (5th Cir. 1967). In denying plaintiff's rezoning request the County Commissioners

assigned reasons[2] for their action which are consistent with the objectives of the zoning resolution.[3] Therefore, in the absence of a showing that there was no evidence to support the decision, the action taken by the County Commissioners cannot be found to be arbitrary.

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[2] The minutes of the County Commissioners' meeting of September 9, 1970, indicate that the rezoning application was denied for the following reasons: "1. Insufficient Water [sic] and inadequate sewage facilities in the area; 2. Inadequate roads—road arteries are already congested; 3. Inadequate schools—already overcrowded; 4. Located between two prime residential areas and would seriously affect them; 5. Large amount of RM zoned land is undveloped [sic] in the immediate area. Mr. Gunnin stated that he saw no need for additional RM zoned property. Carvis Williams seconded the motion and same was unanimously adopted."

[3] Article I of the Zoning Resolution of Gwinnett County, Georgia, states the purpose of the resolution as follows:

". . . [F]or the purpose of promoting the health, safety, morals, convenience, order, prosperity or the general welfare of the present and future inhabitants of Gwinnett County; of lessening congestion in the streets; securing safety from fire, panic and other dangers; providing adequate light and air; preventing the overcrowding of land, avoiding both undue concentration of population and urban sprawl; facilitating the adequate provision of transportation, water, sewerage, schools, parks and other public requirements; protecting property against blight and depreciation; encouraging the most appropriate use of land, buildings and other structures throughout the County; securing economy in government expenditures; and for other purposes, all in accordance with a comprehensive plan for the development of Gwinnett County, the County Commissioners of Gwinnett County do hereby ordain and enact into law the following Articles and Sections of the Zoning Resolution of Gwinnett County, Georgia."

Not only does the record indicate that evidence was presented at an August 25, 1970 hearing before the Commissioners but plaintiff does not assert that there was no evidence to support the decision. What plaintiff specifically complained of at the hearing is that the evidence considered by the Commissioners was "secret evidence", not competent to support the decision. The charge that "secret evidence" was considered stems from the allegation that certain evidence was considered which was not presented at the hearing before the Commissioners. The record clearly indicates that a hearing was held before the Commissioners on August 25, 1970, at which the rezoning application was discussed and evidence received both supporting and opposing the rezoning. The record further shows that one of the Commissioners requested a continuance in order that he might obtain additional studies and consult with the Gwinnett County Engineering Department. On September 9, 1970, the Commissioners again considered plaintiff's rezoning application and denied it. While some of the reasons for denying the requests were apparently the result of independent investigation by the Commissioners, this does not mean the decision is based on incompetent evidence or that plaintiff has been denied procedural due process.[4] Since the Commissioners were engaged in an exercise of legislative authority, it is not inconsistent with due process requirements for the Commissioners to make reference to reports of various county agencies.

At the hearing held in this case, plaintiff further

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[4] In essence plaintiff claims denial of procedural due process in that it was not afforded the right of confrontation with respect to sources of the alleged "secret evidence."

asserted that it did not know in advance what factors the Commissioners would consider in making their determination and were, therefore, vulnerable to "secret evidence." As a matter of law, this contention is without merit. The Gwinnett County zoning resolution sufficiently sets forth the objectives to be achieved by zoning and the standards which shall govern the decisions of the local zoning authority. As a rezoning applicant plaintiff had the burden of demonstrating that its plan was consistent with those objectives and standards.

Therefore, as to plaintiff's due process contentions it not only clearly appears that plaintiff was afforded procedural due process in connection with the various hearings before local zoning authorities, but there is nothing to indicate that the decision of the Commissioners could be found to be arbitrary.

Plaintiff's equal protection allegations are equally without merit. Since the Commissioners' decision was not arbitrary, the fact that plaintiff's property is not accorded the same zoning status as another parcel of land does not mean that equal protection has been denied. Under any zoning scheme various parcels of property are permitted certain limited uses. Only if the zoning decision arbitrarily draws the line between various uses does the zoning violate equal protection. As to plaintiff's final equal protection argument regarding the right to vote for local zoning officials it is questionable whether a limited partnership has standing to raise the question since it cannot vote. However, even if standing is present, the argument is without merit.

For the foregoing reasons, the complaint is hereby Dismissed.

This 29 day of September, 1971.

Newell Edenfield
United States District Judge

United States District Court
Northern District of Georgia
Atlanta Division

South Gwinnett Venture, a Partnership Composed of South Gwinnett Apartments, Inc., Jack Green and Bonnie Green

vs.

W. R. (Dudge) Pruitt, Julian W. Archer, Maron Buice, Ray W. Gunnin, and Carvis P. Williams, Individually. and as Commissioners of Gwinnett County, Georgia; and Ralph Herrington, Individually and as Chief Building Inspector of Gwinnett County

Civil Action No. 14844

ORDER

(Filed in Clerk's Office September 30, 1971)

For the reasons set forth in the companion case, **Rockbridge Associates, Ltd. v. Pruitt,** Civil Action No. 14483 (N.D.Ga., Sept. 29 1971), the complaint in the above-captioned case is Dismissed.

This 29th day of September, 1971.

NEWELL EDENFIELD
United States District Judge

APPENDIX B

In the United States Court of Appeals
for the Fifth Circuit

No. 71-3420

South Gwinnett Venture, a partnership composed of
South Gwinnett Apartments, Inc. et al.,
Plaintiffs-Appellants,

versus

W. R. (Dudge) Pruitt, et al.,
Defendants-Appellees.

No. 71-3421

Rockbridge Associates, Ltd.,
a Georgia Limited Partnership,
Plaintiff-Appellant,

versus

W. R. (Dudge) Pruitt, et al.,
Defendants-Appellees.

Appeals from the United States District Court for the
Northern District of Georgia

(April 4, 1973)

Before Wisdom and Ingraham, Circuit Judges and
Bootle, District Judge

Ingraham, Circuit Judge: These appeals arose from suits filed in the district court by the respective plaintiffs, each against the Commissioners and the Chief Building Inspector of Gwinnett County, Georgia,

each praying that certain portions of the zoning ordinance enacted by the Commissioners be declared unconstitutional and that the Chief Building Inspector issue building permits for the constructions of apartments upon the subject property. The district court dismissed the suits upon the motions of the defendants, holding that the rezoning applications called for a quasi legislative judgment by the zoning board, and as such the district court was without subject-matter jurisdiction to review the actions for anything more than arbitrariness and interest on the part of the board members.

The use of non-record secret evidence by the Gwinnett County Commissioners in denying appellants' application for the rezoning of certain tracts of land from single family residential classification to multi-family apartment use designations has projected purely local land use questions into a federal forum.

Contending that their applications had been denied by the Commissioners on evidence dehors the record and that the Commissioners' reliance on such evidence deprived them of due process, the appellants brought suit against the County Commissioners in federal district court asserting jurisdiction under 28 U.S.C. § 1331(a). The district court, noting that federal courts are properly loathe to stretch their limited jurisdiction to become super zoning boards of appeal, found the denial of an application for rezoning to be a quasi-legislative act. As such, the court reasoned it was not impermissible for the quasi-legislators to use non-record materials in exercising their judgment. Consequently, the court dismissed appellants' complaint. 341 F.Supp. 703 (N.D.Ga., 1971).

We differ in only one salient regard from the decision of the district court. Our difference concerns the nature of an application for the rezoning of a tract of land. As we recently noted in *Higginbotham v. Barrett*, F.2d (5th Cir., 1973) [No. 72-1526, February 14, 1973]:

> "The law is settled that the zoning of property, including the preparation of comprehensive land use plans, involves the exercise of judgment which is legislative in character and is subject to judicial control only if arbitrary and without rational basis. *Shenk v. Zoning Commission of the District of Columbia*, D.C. Cir., 1971, 440 F.2d 295, 297; *Diedrich v. Zoning Commission of the District of Columbia*, D.C. Cir., 1967, 393 F.2d 666; *City of St. Paul v. Chicago, St. Paul, Minneapolis and Omaha Railway Company*, 8 Cir., 1969, 413 F.2d 762, 766-7. Cf. *Goldblatt v. Town of Hempstead*, 1962, 369 U.S. 590, 594-5, 82 S.Ct. 987, 8 L.Ed.2d 130."

The adoption of a legislative plan for the entire community must be distinguished from the treatment which a specific tract of land receives when its owner petitions for reclassification under that plan. As the record in this case demonstrates, consideration of that petition is an exercise of legislative power in a case by case adjudicative setting. *Compare, Londoner v. Denver*, 210 U.S. 373 (1908) with *Bi-Metallic Inv. Co. v. State Board of Equalization*, 239 U.S. 441 (1915). *See, Hot Shoppes, Inc. v. Clouser*, 231 F.Supp. 825 (D.C., 1964), affirmed 346 F.2d 834 (D.C.Cir., 1965); and *Donovan v. Clarke*, 222 F. Supp. 632 (D.C., 1963). Cf. *State ex rel Ludlow v. Guffey*, 306 S.W.2d 552 (Mo.,

1957); *Morton v. Mayor and Council of Clark Township*, 102 N.J.Super. 84, 245 A.2d 377 (1968). *See*, generally, K. Davis, Administrative Law Text. Thus distinguished from the legislative action of adopting a comprehensive zoning plan, the adjudicative decision inherent in tract rezoning requires the decision maker to adhere to concepts of minimal due process. *Hornsby v. Allen*, 326 F.2d 605 (5th Cir., 1964); *Hot Shoppes, Inc. v. Clouser*, supra; *Donovan v. Clark*, supra. Here, appellants' complaint alleged that rezoning of the property had been denied by the Commissioners without a statement of their reasons and by recourse to evidence which was not in the record. Such administrative action has long been condemned, *Morgan v. United States*, 304 U.S. 1 (1938); *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292 (1937); *United States v. Abilene & Southern Ry. Co.*, 265 U.S. 274 (1924); *Interstate Commerce Commission v. Louisville & Nashville R.R. Co.*, 227 U.S. 88 (1913); *Hornsby v. Allen*, supra, and we do so here.

The orders of the district court are Reversed and the causes Remanded for proceedings consistent herewith.

Bootle, District Judge, dissenting:

I respectfully dissent. I would affirm for all reasons stated by the Trial Court in his memorandum opinion, *Rockbridge Associates, Ltd. v. Pruitt*, 341 F.. Supp. 703 (N.D. Ga., 1971), plus an additional reason to be stated. I agree with the Trial Court "that plaintiff was afforded procedural due process in connection with the various hearings before local zoning authorities" and that "there is nothing to indicate that the decision of the Commissioners could be found to

be arbitrary." The majority opinion groups these two cases together and over-reacts, I think, to the contention of one of the plaintiffs that as to it the County Commissioners in star chamber fashion used non-record secret evidence. I, naturally, have examined that charge carefully. First, it must be noted that only Rockbridge Associates, Ltd. makes this contention. South Gwinnett Venture's case was considered by the Commissioners on November 24, 1970 and again on December 1, 1970, and there is no contention that any secret evidence was used in the consideration of that case. The Rockbridge case was considered by the Commissioners earlier on August 25, 1970 and September 9, 1970, and it is in connection with these earlier hearings that Rockbridge claims the use of secret evidence. Secondly, I think this charge is unsubstantiated. What happened is this: at the August 25, 1970 hearing one of the Commissioners moved to "table the decision for two weeks so that he could obtain additional studies and consult with the Engineering Department." This does not sound star chamberish. His intentions were announced in open meeting. The postponement was for two weeks. The Engineering Department of Gwinnett County is probably not so large that plaintiffs could not have ascertained whatever information it furnished the Commissioners had they so desired. Nor does any reason appear why they did not inquire at the resumed hearing on September 9, 1970 as to what additional studies, if any, the Commissioners had obtained. Rockbridge argues that the Commissioners have refused to disclose the contents of their conversation with the Engineering Department and the additional studies. Nothing in the record substantiates this argument. Nor was there any request by plaintiffs for any more complete or detailed findings of fact by the

Commissioners. All this suggests that plaintiffs' desire to make a federal case exceeded their fear of deprivation of due process.

An additional reason not specifically assigned by the Trial Court for dismissing the complaint is failure of the plaintiffs to exhaust their administrative remedies. While a litigant normally need not exhaust his state "judicial" remedies, normally he must exhaust his state "legislative" or "administrative" remedies before challenging state action in federal court. *See* Wright, Federal Courts, § 49, p. 187 (2d ed.). Under the applicable zoning ordinance plaintiffs had the right to appeal to the Zoning Board of Appeals from any decision of the Chief Building Inspector, and said Board of Appeals is empowered:

> "1. To hear and decide appeals when it is alleged there is error in any order, requirement, decision or determination made by the Chief Building Inspector in the enforcement of this Zoning Resolution.
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> "2. To hear and decide requests for the Special Exceptions of the Zoning Resolution upon which the Zoning Board of Appeals is required to pass.
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> "3. To authorize, upon appeal in specific cases, such variances from the terms of the Zoning Resolution as will not be contrary to the public interest where, owing to certain conditions, a literal enforcement of the Zoning Resolution will, in an individual case result in unnecessary hardship, so that the spirit of the Zoning Resolution shall be observed, public safety and welfare secured and substantial justice done. Such variances may

be granted in such individual cases of unnecessary hardship upon a finding by the Zoning Board of Appeals that:

"a. There are extraordinary and exceptional conditions pertaining to the particular property in question because of its size, shape or topography, and

"b. the application of the Resolution to this particular piece of property would create an unnecessary hardship, and

"c. such conditions are peculiar to the particular piece of property involved, and

"d. such conditions are not the result of any actions of the property owner, and

"e. relief, if granted, would not cause substantial detriment to the public good nor impair the purposes or intent of this Resolution, and

"f. no variance may be granted for a use of land or building or structure that is prohibited by this Resolution.

"4. In exercising the above powers, the Zoning Board of Appeals may, in conformity with the provisions of this Resolution, reverse or affirm, wholly or partly, or may modify the order, requirements, decisions or determination from which the appeal is taken and, to that end, shall have all the powers of the Chief Building Inspector from whom the appeal is taken and may issue or direct the issuance of a Building or Occupancy permit."

The foregoing itemization of instances in which the Zoning Board of Appeals might grant variances

from the terms of the Zoning Resolution when read in connection with Article I of the Zoning Resolution stating its objectives:

> ". . . [F]or the purposes of promoting the health, safety, morals, convenience, order, prosperity or the general welfare of the present and future inhabitants of Gwinnett County; of lessening congestion in the streets; securing safety from fire, panic and other dangers; providing adequate light and air; preventing the overcrowding of land, avoiding both undue concentration and urban sprawl; facilitating the adequate provision of transportation, water, sewerage, schools, parks and other public requirements; protecting property against blight and depreciation; encouraging the most appropriate use of land, buildings and other structures throughout the County; securing economy in government expenditures; and for other purposes, all in accordance with a comprehensive plan for the development of Gwinnett County, the County Commissioners of Gwinnett County do hereby ordain and enact into law the following Articles and Sections of the Zoning Resolution of Gwinnett County, Georgia"

fully answers plaintiffs' contention of lack of standards. *See Atlanta Bowling Center, Inv. v. Allen*, 389 F.2d 713 (5th Cir. 1968).

Granted that what is unquestionably a legislative function, the adoption of a general zoning plan or the zoning of an entire area, becomes, next day, to some extent a judicial function, when one of the affected property owners petitions for relief from the zoning

restriction, certainly the metamorphosis is not complete. What was all legislative one day remains at least quasi-legislative the next day. *See Higginbotham, etc. v. Barrett, et. al.*, . . . F.2d . . (5th Cir. 1973) [No. 72-1526, February 14, 1973], and *Donovan v. Clarke*, 222 F. Supp. 632 (D.C. 1963). The requirements of procedural due process are not procrustean. The Supreme Court said in *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 6 L.Ed.2d 1230, 1236 (1961) ". . . consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." See also *Goldberg v. Kelly*, 397 U.S. 254, 25 L.Ed. 2d 287 (1970). In *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961), it was held that in some instances, to-wit: suspension of students from a tax-supported college, procedural due process does not require "a full-dress judicial hearing, with the right to cross-examine witnesses." Under the facts of this case it was not an infirmity of Constitutional proportions for one of the Commissioners to move for an adjournment of two weeks stating his intention to obtain additional studies and consult with the Engineering Department, particularly since no objection was voiced by petitioners at the public hearing at which that announcement of intention was made, and since no effort was made by plaintiffs to obtain information as to the content of such studies or consultation until after the filing of this suit.

Public hearings were held. Plaintiffs attended. At least one of them, South Gwinnett Venture, was accompanied and represented by counsel. The other plaintiff,

whether or not accompanied and represented by counsel, fully participated in the public hearing by presenting evidence.

The Trial Court recognized that plaintiffs were entitled to due process and concluded specifically that they had not been deprived thereof. A hearing was held in the court below at which plaintiffs clarified their contentions and the facts in the case. Thus the court was not acting solely on pleadings but was fully informed. The complaints were dismissed not for lack of jurisdiction but for failure to present any substantial federal question.

As was said in *Confederacion de la Raza Unida v. City of Morgan Hill*, 324 F. Supp. 895 (N.D. Calif. 1971): "the courts have traditionally recognized that zoning matters are of particular concern to, and the province of, the local communities involved and . . . should interfere with the judgment of the local authorities only in the most extreme cases, and under the most extreme circumstances. This attitude goes back at least as far as *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365 . . ." And it was said in *Donovan v. Clarke*, *supra*, at 634: "Such a determination (on the petition of a resident for a change in the zoning of his property) is subject to review by the courts, not on the merits of the issues presented, but as to whether the action was justified or was capricious, arbitrary, unreasonable or discriminatory." And this court said in *Higginbotham, etc. v. Barrett, et al.*, *supra*, "The law is settled that the zoning of property, *including* the preparation of comprehensive land use plans, involves the exercise of judgment which is legislative in character and is subject to judicial control only if arbitrary and without

rational basis." (Emphasis added.) The quoted holding indicates that zoning *in general*, and not just the preparation of comprehensive land use plans is a legislative function.

Even in a criminal trial where the requirements of due process are *strictissimi juris* a perfect trial is not demanded, only a fair trial. *Lutwak v. United States*, 344 U.S. 604, 97 L.Ed. 593 (1953); *United States v. Rhoden*, 433 F.2d 598 (5th Cir. 1972).

The case of *Hot Shoppes, Inc. v. Clouser*, 231 F. Supp. 825 (D.C. 1964), relied upon by appellants is easily distinguishable on two grounds: first, there the Board of Zoning Adjustment violated the detailed regulations governing its own procedure; and, second, the members of the Board conducted an inspection of the premises and failed to set forth the facts which it claimed it discovered as a result of the inspection. The court said "plaintiff did not know that such inspection had taken place, and had no opportunity to question or refute the results of such inspection." That is not the case *sub judice*. Our appellants knew that one Commissioner planned to obtain additional studies and to consult with the Engineering Department prior to the next meeting. It would have been an easy matter for our appellants to have attended the next regular meeting, to have requested that Commissioner to inform them as to exactly what new information, if any, he had obtained through the additional studies and from his consultation with the Engineering Department, and to have requested, if needed or desired, an opportunity to refute the same.

United States Court of Appeals
For the Fifth Circuit

October Term, 1971

No. 71-3420

D. C. Docket No. 14844

South Gwinnett Venture, a partnership composed of South Gwinnett Apartments, Inc. et al.,
Plaintiffs-Appellants,

versus

W. R. (Dudge) Pruitt, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

Before Wisdom and Ingraham, Circuit Judges and Bootle, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court for proceedings consistent with the opinion of this Court;

It is further ordered that defendants-appellees pay to plaintiffs-appellants the costs on appeal to be taxed by the Clerk of this Court.

April 4, 1973

Bootle, District Judge, dissenting.
Issued as Mandate.

APPENDIX C

SOUTH GWINNETT VENTURE, a partnership composed of South Gwinnett Apartments, Inc., et al., Plaintiffs-Appellants,

v.

W. R. (Dudge) PRUITT et al.,
Defendants-Appellees.

ROCKBRIDGE ASSOCIATES, LTD.,
a Georgia Limited Partnership,
Plaintiff-Appellant,

v.

W. R. (Dudge) PRUITT et al.,
Defendants- Appellees.
Nos. 71-3420, 71-3421.

United States Court of Appeals,
Fifth Circuit
Dec. 3, 1973.

Before JOHN R. BROWN, Chief Judge, and WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, RONEY and GEE, Circuit Judges.

BY THE COURT:

A majority of the Judges in active service, on the Court's own motion, having determined to have these cases re-heard en banc,

It is ordered that these causes shall be reheard by the Court en banc on briefs without oral argument. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

APPENDIX D

SOUTH GWINNETT VENTURE, a Partnership composed of South Gwinnett Apartments, Inc., et al., Plaintiffs-Appellants,

v.

W. R. (Dudge) PRUITT et al., Defendants-Appellees..

ROCKBRIDGE ASSOCIATES, LTD., a Georgia Limited Partnership, Plaintiff-Appellant,

v.

W. R. (Dudge) PRUITT et al., Defendants-Appellees.
Nos. 71-3420, 71-3421.

United States Court of Appeals, Fifth Circuit.
March 14, 1974.

Before BROWN, Chief Judge, and WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, INGRAHAM,* RONEY and GEE, Circuit Judges.

COLEMAN, Circuit Judge.

In 1970, plaintiffs-appellants were the owners of land in Gwinnett County, Georgia, zoned partly residential and partly commercial. They applied to the

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* Judge Ingraham sat as a member of the original panel in this case and thus was a member of the en banc court, *Allen v. Johnson*, 5 Cir., 1968, 391 F.2d 527.

Gwinnett County Planning Commission to have the property rezoned to an apartment classification. The Planning Commission recommended the change, but the Gwinnett County Commissioners denied it. Suit was brought, alleging that the action of the County Commissioners violated equal protection and due process rights guaranteed the plaintiffs by the Fourteenth Amendment; that is, the decision was arbitrary, capricious, and without due process.

After a hearing, the District Court dismissed the complaint on the ground that it presented no substantial federal question, Rockbridge Associates, Ltd. v. Pruitt (N.D.Ga., 1971). 341 F.Supp. 703. The District Court specifically held that it was not the function of federal district courts to serve as zoning appeal boards; that the decision of local zoning authorities is an exercise of judgment legislative in character; and that these decisions are subject to judicial control "only if arbitrary or if interested parties have been denied procedural due process", 341 F.Supp. at 705. In its reported opinion, the District Court held that the County Commissioners had assigned reasons for the denial of the zoning change, that the reasons were consistent with the objectives of the zoning resolution, and that the action taken was not arbitrary because there was evidence to support it.

Upon appeal, a Panel of this Court, by a divided vote, reversed the District Court, South Gwinnett Venture v. Pruitt and Rockbridge Associates, Ltd. v. Pruitt, 5 Cir., 1973, 482 F.2d 389. It was the opinion of the Panel majority that the denial of the rezoning application without a statement of reasons and by recourse to evidence which was not in the record was invalid for

failure to adhere to concepts of minimal due process. The Panel duly noted the opinion of this Court in Higginbotham v. Barrett, 5 Cir. 1973, 473 F.2d 745, which held "that the zoning of property, including the preparation of comprehensive land use plans, involves the exercise of judgment which is legislative in character and is subject to judicial control only if arbitrary and without a rational basis." The Panel sought to distinguish *Higginbotham*, however, by saying that the adoption of a legislative plan for the entire community differs from a petition for *reclassification* under such a plan. Consideration of rezoning petitions was described as "an exercise of legislative power in a case by case adjudicative setting", therefore, rezoning decisions require an adherence "to concepts of minimal due process", citing Hornsby v. Allen, 5 Cir., 1964, 326 F.2d 605.[1] The judgment of the District Court was reversed and the cause remanded for further proceedings consistent therewith.

Pursuant to an appropriate order the case has been reheard *en banc*. We affirm the judgment of the District Court.

We adhere to the teachings of Higginbotham v. Barrett, 5 Cir., 1973, 473 F.2d 745, in which it was held that local zoning is a quasi-legislative procedure, not subject to federal juridical consideration in the absence of arbitrary action.

Moreover, we see no viable distinction between zoning board functions involved in the adoption of a com-

[1] Whatever vitality remains in *Hornsby* for licensing cases, cf. Atlanta Bowling Center, Inc. v. Allen, 5 Cir., 1968, 389 F.2d 713, its holding will not be extended to zoning cases.

prehensive zoning plan and those exercised in the reclassification of a piece of property under an existing plan, see Shenk v. Zoning Commission of the District of Columbia, 1971, 142 U.S.App.D.C. 267, 440 F.2d 295, cited in *Higginbotham, supra.*

In *Shenk*, the landowners wanted to rezone property from "single family" to "small apartments". Litigation ultimately led to the enunciation of principles to be applied to federal court review of rezoning cases. A zoning commission is a quasi-legislative body. It is not required to make findings of fact or state the reasons for the action taken. Its actions are entitled to a presumption of validity. The only question which federal district courts may consider is whether the action of the zoning commission is arbitrary and capricious, having no substantial relation to the general welfare. It necessarily follows that upon a factual showing of arbitrariness there must be some basis in fact and law to justify the zoning action as consistent with reasonableness.

In the cases presently before us, the County Commissioners did state the reasons for refusing the application to rezone, which were the inadequacy of sewage facilities, roads and schools in the area, plus the adverse affect on existing residential areas.

We agree with the District Court that the plaintiffs simply failed to present a substantial federal question and that the complaints should have been dismissed. In reaching this conclusion, we see no constitutional significance in the consultations between the county commissioners and the county engineer or other public officials. We accordingly decline, in the context

of this litigation, to apply the "secret" label to any information thus obtained.

The judgment of the District Court is Affirmed.

WISDOM and INGRAHAM, Circuit Judges (dissenting):

We respectfully dissent for the reasons stated in the panel majority opinion. South Gwinnett Venture v. Pruitt and Rockbridge Associates, Ltd. v. Pruitt, 5 Cir., 1973, 482 F.2d 389.

RONEY, Circuit Judge (specially concurring):

I concur in the result reached by the majority for what may be a slightly different reason. Although I am not sure of the legal difference between arbitrary and capricious conduct and the denial of certain elements of due process, I agree with Judges Wisdom and Ingraham as to a distinction between the necessary action for adoption of a comprehensive zoning plan and the treatment that must be accorded a landowner in consideration of his petition to reclassify a specific tract of land under an existing plan. For want of better words, it seems appropriate to say that in the latter instance, the decision maker must accord the petitioner minimal due process.

As revealed, however, by the opinion of Judge Edenfield in the trial court, the dissenting opinion of Judge Bootle sitting with the panel on our court, and the opinion of Judge Coleman for the en banc court, the plaintiffs were accorded minimal due process in this case.

I concur, therefore, in the dismissal of the cause by the trial court not because plaintiffs were entitled to no more than if a comprehensive plan were being adopted, but because they received the more to which they were entitled.

APPENDIX E

Georgia Code § 2-8402:

"Paragraph I. Home rule for counties.—(a) The governing authority of each county shall have legislative power to adopt clearly reasonable ordinances, resolutions or regulations relating to its property, affairs and local government for which no provision has been made by general law and which is not inconsistent with this Constitution, or any local law applicable thereto. Any such local law shall remain in force and effect until amended or repealed as provided in subparagraph (b). This, however, shall not restrict the authority of the General Assembly by general law to further define this power or to broaden, limit or otherwise regulate the exercise thereof. The General Assembly shall not pass any local law to repeal, modify or supersede any action taken by a county governing authority under this Section except as authorized under subparagraph (c) hereof.

"(b) Except as provided in subparagraph (c) a county may, as an incident of its home rule power, amend or repeal the local Acts applicable to its governing authority by following either of the procedures, hereinafter set forth:

"1. Such local Acts may be amended or repealed by a resolution or ordinance duly adopted at two regular consecutive meetings of the county governing authority not less than seven nor more than 60 days apart. A notice containing a synopsis of the proposed amendment or repeal shall be published in the official county organ once a week for three weeks within a period of

60 days immediately preceding its final adoption. Such notice shall state that a copy of the proposed amendment or repeal is on file in the office of the clerk of the superior court of the county for the purpose of examination and inspection by the public. The clerk of the superior court shall furnish anyone, upon written request, a copy of the proposed amendment or repeal. No amendment or repeal hereunder shall be valid to change or repeal an amendment adopted pursuant to a referendum as provided in 2 of this subparagraph or to change or repeal a local Act of the General Assembly ratified in a referendum by the electors of such county unless at least 12 months have elapsed after such referendum. No amendment hereunder shall be valid if inconsistent with any provision of this Constitution or if provision has been made therefor by general law.

"2. Amendments to or repeals of such local Acts or ordinances, resolutions or regulations adopted pursuant to subparagraph (a) hereof may be initiated by a petition filed with the ordinary of the county containing, in cases of counties with a population of 5,000 or less, the signatures of at least 25 per cent of the electors registered to vote in the last general election; in cases of counties with a population of more than 5,000 but not more than 50,000, at least 20 per cent of the electors registered to vote in the last general election; and in cases of a county with a population of more than 50,000, at least 10 per cent of the electors registered to vote in the last general election, which petition shall specifically set forth the exact language of the proposed amendment or repeal. The ordinary shall determine the validity of such petition within 60 days of its being filed with the ordinary. In the event the ordinary determines that

such petition is valid, it shall be his duty to issue the call for an election for the purpose of submitting such amendment or repeal to the registered electors of the county for their approval or rejection. Such call shall be issued not less than 10 nor more than 60 days after the date of the filing of the petition. He shall set the date of such election for a day not less than 60 nor more than 90 days after the date of such filing. The ordinary shall cause a notice of the date of said election to be published in the official organ of the county once a week for three weeks immediately preceding such date. Said notice shall also contain a synopsis of the proposed amendment or repeal and shall state that a copy thereof is on file in the office of the ordinary of the county for the purpose of examination and inspection by the public. The ordinary shall furnish anyone, upon written request, a copy of the proposed amendment or repeal. If more than one-half of the votes cast on such question are for approval of the amendment or repeal, it shall become of full force and effect; otherwise it shall be void and of no force and effect. The expense of such election shall be borne by the county and it shall be the duty of the ordinary to hold and conduct such election. Such election shall be held under the same laws and rules and regulations as govern special elections, except as otherwise provided herein. It shall be the duty of the ordinary to canvass the returns and declare and certify the result of the election. It shall be his further duty to certify the result thereof to the Secretary of State in accordance with the provisions of Paragraph 4 of this Section. A referendum on any such amendment or repeal shall not be held more often than once a year. No amendment hereunder shall be valid if inconsistent with any provision of this Constitution or if provision has been made therefor by general law.

"In the event that the ordinary determines that such petition was not valid, he shall cause to be published in explicit detail the reasons why such petition is not valid: Provided, however, that in any proceeding in which the validity of the petition is at issue, the tribunal considering such issue shall not be limited by the reasons assigned. Such publication shall be in the official organ of the county in the weeks immediately following the date on which such petition is declared to be not valid.

"(c) The power granted to counties in subparagraphs (a) and (b) above shall not be construed to extend to the following matters or any other matters which the General Assembly by general law has preempted or may hereafter preempt, but such matters shall be the subject of general law, or the subject of local Acts of the General Assembly to the extent that the enactment of such local Acts is otherwise permitted under this Constitution:

"1. Action affecting any elective county office, the salaries thereof, or the personnel thereof, except the personnel subject to the jurisdiction of the county governing authority.

"2. Action affecting the composition, form, procedure for election or appointment, compensation, and expenses and allowances in the nature of compensation, of the county governing authority.

"3. Action defining any criminal offense or providing for criminal punishment.

"4. Action adopting any form of taxation beyond that authorized by law or by this Constitution.

"5. Action expending the power of regulation over any business activity regulated by the Public Service Commission beyond that authorized by local or general law or by this Constitution.

"6. Action affecting the exercise of the power of eminent domain.

"7. Action affecting any court or the personnel thereof.

"8. Action affecting any public school system.

"(d) The power granted in subparagraphs (a) and (b) of this Paragraph shall not include the power to take any action affecting the private or civil law governing private or civil relationships, except as is incident to the exercise of an independent governmental power.

"(e) Nothing in this Paragraph shall affect the provisions of Paragraphs 2 and 3 [2-8403, 2-8404] of this Section."

APPENDIX F

THE ZONING RESOLUTION OF GWINNETT COUNTY

Whereas the Municipal-Gwinnett County Planning Commission on April 28, 1970, reviewed the proposed Land Use and Major Thoroughfare Map prepared for it by Hill and Adley Associates, Planning Consultants, dated November, 1962, and unanimously recommended that it be adopted by the Board of Commissioners of Gwinnett County, and

Whereas the Municipal-Gwinnett County Planning Commission on April 28, 1970, reviewed the text of a proposed Zoning Resolution prepared for it by Howard K. Menhinick Director of Planning and Development, Keck and Wood, Inc., dated March 16, 1970, held a duly advertised public hearing thereon on May 26, 1970, and thereafter recommended to the Board of Commissioners of Gwinnett County a text of the Zoning Resolution for adoption,

Therefore, the Board of Commissioners of Gwinnett County on June 2, 1970, adopted the recommended text of the Zoning Resolution with certain changes and on June 9, 1970, incorporated by reference into the Zoning Resolution of Gwinnett County: (1) the existing Zoning Map of Gwinnett County, dated April 28, 1970; (2) the existing Zoning Tax Maps of Gwinnett County, dated April 28, 1970; (3) the Flood District Boundary Line Map, dated April 28, 1970; (4) the Land Use and Major Thoroughfare Map, dated November, 1962; and (5) adopted certain amendments

to the text of the Zoning Resolution, after recommendation by the Municipal-Gwinnett County Planning Commission after a duly advertised public hearing thereon.

Amendments to the text of the Zoning Resolution have been recommended by the Municipal-Gwinnett County Planning Commission to the Board of Commissioners of Gwinnett County, after duly advertised public hearings and the text of the Zoning Resolution has been amended by the Board of Commissioners of Gwinnett County on:

May 24, 1970

December 8, 1970.

ARTICLE XVI
ZONING BOARD OF APPEALS

Section 1600. Zoning Board of Appeals Created. A Zoning Board of Appeals is hereby created.

Section 1601. Membership and Appointment. The Zoning Board of Appeals shall consist of five members residing within the unincorporated portion of Gwinnett County, appointed by the County Commissioners of Gwinnett County. One member of the Zoning Board of Appeals shall be a member of the Planning Commission. No other member of the Zoning Board of Appeals shall hold any other public office in Gwinnett County.

Section 1602. Terms of Office. The term of office of each member of the Zoning Board of Appeals shall

be for three years, or, thereafter until his successor is appointed. However, the terms of the original members of the Zoning Board of Appeals shall be as follows: two shall serve for terms of three years, two for terms of two years and one for a term of one year. Thereafter, each member shall be appointed to serve a term of three years. Members may be reappointed. Any vacancy in the membership shall be filled for the unexpired term in the same manner as the initial appointment.

Members shall be removable for cause by the County Commissioners of Gwinnett County upon written charges and after a public hearing.

Any member of the Zoning Board of Appeals shall be disqualified to act upon a matter in which the member has an interest.

Zoning Board of Appeals members shall be paid $15 per meeting attended as reimbursement for their services and any expenses incurred in connection with their official duties.

Section 1603. Officers. The Zoning Board of Appeals shall elect one of its members, other than the member of the Planning Commission, as Chairman and a second one as Vice-Chairman. The Chairman and Vice-Chairman shall serve for one year or until reelected or until successors are elected. The Zoning Board of Appeals shall appoint a Secretary who may be an employee of the County or of the Planning Commission.

Section 1604. Procedure. The Zoning Board of

Appeals shall adopt rules of procedures. Meetings of the Zoning Board of Appeals shall be at the call of the Chairman and at such other times as the members of the Zoning Board of Appeals may determine. The Chairman or, in his absence, the Vice-Chairman, may administer oaths and compel the attendance of witnesses by subpoena.

The Zoning Board of Appeals shall keep minutes of its proceedings, showing the vote of each member upon each question or, if absent or failing to vote, indicating such fact. The Zoning Board of Appeals shall keep records of its examinations and other official actions, all of which shall be immediately filed in the office of the Zoning Board of Appeals and shall be a public record.

Section 1605. Powers of the Zoning Board of Appeals. The Zoning Board of Appeals shall have the following powers:

1. To hear and decide appeals when it is alleged there is error in any order, requirement, decision or determination made by the Chief Building Inspector in the enforcement of this Zoning Resolution.

2. To hear and decide requests for the Special Exceptions of the Zoning Resolution upon which the Zoning Board of Appeals is required to pass.

3. To authorize, upon appeal in specific cases, such variances from the terms of the Zoning Resolution as will not be contrary to the public interest where, owing to special conditions, a literal enforcement of the Zoning Resolution will, in an individual case, result in

unnecessary hardship, so that the spirit of the Zoning Resolution shall be observed, public safety and welfare secured and substantial justice done. Such variances may be granted in such individual cases of unnecessary hardship upon a finding by the Zoning Board of Appeals that:

a. There are extraordinary and exceptional conditions pertaining to the particular property in question because of its size, shape or topography, and
b. the application of the Resolution to this particular piece of property would create an unnecessary hardship, and
c. such conditions are peculiar to the particular piece of property involved, and
d. such conditions are not the result of any actions of the property owner, and
e. relief, if granted, would not cause substantial detriment to the public good nor impair the purposes or intent of this Resolution, and
f. no variance may be granted for a use of land or building or structure that is prohibited by this Resolution.

4. In exercising the above powers, the Zoning Board of Appeals may, in conformity with the provisions of this Resolution, reverse or affirm, wholly or partly, or may modify the order, requirements, decisions or determination from which the appeal is taken and, to that end, shall have all the powers of the Chief Building Inspector from who the appeal is taken and may issue or direct the issuance of a Building or Occupancy permit.

Section 1606. Appeals to the Zoning Board of Appeals. Appeals to the Zoning Board of Appeals may be taken by any person aggrieved or by any official of the County affected by any decision of the Chief Building Inspector. Such appeal shall be taken within fifteen days of filing with the Chief Building Inspector and with the Zoning Board of Appeals a Notice of Appeal specifying the grounds thereof. The Building Inspector shall forthwith transmit to the Zoning Board of Appeals all the papers constituting the record upon which the action appealed from was taken.

An appeal stays all legal proceedings in furtherance of the action appealed from unless the Chief Building Inspector certifies to the Zoning Board of Appeals that, by reason of facts stated in the certificate, a stay would, in his opinion, cause imminent peril to life and property. In such a case, proceedings shall not be stayed otherwise than by the Zoning Board of Appeals or by a restraining order that may be granted by a court of record on application on notice to the Chief Buildng Inspector, and on due cause shown.

Section 1607. Required Public Hearings by the Zoning Board of Appeals. Before the Zoning Board of Appeals acts upon an application for a Variance or a Special Exception, it shall hold a public hearing thereon. The notice of the time and place of such hearing shall be published at least 15 days prior to the hearing in the official organ of the County. At the hearing any party may appear in person or by agent or attorney.

In addition, the County shall erect in a conspicuous place on the property involved a sign which shall contain information as to the Variance or Special Excep-

tion applied for and time and place of hearing. Failure to erect and maintain the sign as specified above shall not invalidate the subsequent determination of the Zoning Board of Appeals.

Section 1608. Reapplication to the Zoning Board of Appeals. If an application for a Special Exception or Variance is denied by the Zoning Board of Appeals, a reapplication for such Special Exception or Variance may not be made earlier than 12 months from the date of the original application.

Section 1609. Appeals from Decisions of the Zoning Board of Appeals. Any person or persons severally or jointly aggrieved by any decision of the Zoning Board of Appeals may take an Appeal to the Superior Court. Such an Appeal to the Superior Court shall be the same as an Appeal to the Superior Court from any decision made by the Court of Ordinary and as specified in Chapter 6-2 of the Code of Georgia except, however, that the Appeal may be filed within thirty days from the date of the decision of the Zoning Board of Appeals. Upon failure to file the appeal within thirty days, the decision of the Zoning Board of Appeals shall be final.

On Appeal, the case shall be heard by the Judge of the Superior Court without a jury unless one of the parties files a written demand for a jury trial within thirty days from the filing of the Appeal.

APPENDIX G

A BRIEF HISTORY OF ZONING IN THE UNITED STATES

A. *The Basic Zoning Scheme envisioned by its creators in the 1920's and the Supreme Court in the Euclid case, which conceived of the local zoning authority as a body with only legislative powers, has never been adhered to in practical operation in Georgia or in any other state.*

1. *Historical evolution of the basic zoning plan and the power of judicial review over it.*

The system of zoning as we know it today had its origin in a land-use control movement which sprang up in this country during the period shortly after the turn of the century. While the concept of zoning received only passing attention at the first City Planning Conference in 1909,[1] not long after that several articles began to appear urging cities to adopt some method of regulation to restrict land use.[2] The first comprehensive zoning ordinance was enacted in New York City in 1916. Prior to this time, height restrictions had

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[1] See Ford, The Scope of City Planning in the United States, S. Doc. No. 422, Hearing on City Planning, 61st Cong., 2d Sess. 70 (1910).

[2] See, e.g., an article by Halderman, "The Control of Municipal Development by the 'Zoning System' and Its Application in the United States," appearing in Crawford, Certain Principles of a Uniform City Planning Code, National Conference on City Planning, at 173 (1912); see also a 1913 report entitled "Districting", by the Height of Buildings Commission, reprinted in Commission on Building Districts and Restrictions, Final Report, App. III, 51 (1916).

been enacted and upheld in Boston, Massachusetts in 1909,[3] and use restrictions were upheld in California as early as 1886.[4] After 1916, the movement in favor of zoning began to snowball, and by 1922 it had taken the country by storm, with 20 enabling acts, almost 50 ordinances, and over 100 zone plans in progress.[5] At the same time, it received a significant impetus from the then-Secretary of Commerce Herbert Hoover, who appointed an Advisory Committee on Building Codes and Zoning. The Committee drafted the Standard State Zoning Enabling Act (hereinafter referred to as the SZEA), which was adopted, in whole or in part, by nineteen states in 1925,[6] and which is still the governing statutory law in nearly all jurisdictions today,[7] including Georgia.[8]

The principal architect of the SZEA was Edward M. Bassett of the New York Bar, who was likewise a member of the Hoover Advisory Committee. In May 1920, while serving as Counsel to the Zoning Committee

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[3] *Welch v. Swasey*, 214 U.S. 91 (1909).

[4] *In re Hang Kie*, 69 Cal. 149, 10 Pac. 327 (1886); see also *Ex parte Quong Wo*, 161 Cal. 220, 118 Pac. 714 (1911); see generally, Pomeroy, Zoning: How Far Have We Come? How Far Can We Go? National Conference on Planning 70 (1940).

[5] Review of Planning in the United States, 1920-21, in 11 Nat. Mun. Rev. 27, 32 (1922).

[6] See Haar, Land Use Planning 157 (2d Ed. 1971).

[7] Within a short period after its second publication, see the Standard State Zoning Enabling Act (SZEA) (U.S. Dept. of Commerce rev. ed. 1926), the SZEA had been adopted without material change by all of the states.

[8] Ga. Code §69-801 et seq. (municipalities); Ga. Code §69-1207 et seq. (municipalities and unincorporated county land).

of New York City, Bassett published an article in the National Municipal Review,[9] which provides an interesting insight into the thinking behind the SZEA. Bassett described the "Chaotic Conditions in Unzoned Cities" as follows:

> [t]he lack of regulation stimulated each owner to build in the most hurtful manner.
>
> . . . .
>
> Bright business streets would be invaded by factories. When the factory use began to predominate, customers would leave the localities, rents of stores would drop, and some of the most eligible business centers of cities became partly deserted. Fortunes were lost because business would move away from the locality where it would naturally remain if not forced out. Public stables and more latterly public garages would enter the best business and residential districts. A garage costing $25,000 might cause a loss of $400,000 in the surrounding values. . . . If the first comer was successful in his business, others were attracted, and soon the residential section was shot through with the unnecessary business buildings. . . . No kind of building was immune from harm.[10]

It is easy to see that Bassett was primarily concerned with the diminution in land values suffered by private property owners when an adjacent parcel of land was put to some use which seemed tantamount to

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[9] See Bassett, "Zoning", 9 Nat. Mun. Rev. 315 (Supp. May 1920).

[10] *Id.* at 315-316.

a nuisance. Thus, he conceived of zoning, which is basically a system of regulation by segregation and classification of buildings according to use, as an extension of private property protection, intended to shield *some* but not all landowners, and not as a vehicle for the public (in the sense of *everyone's*) good! Moreover, Bassett's conception of an undesirable neighbor was not limited to conventional notions of nuisance, such as smoking factories, slaughterhouses, and gasoline stations ("garages"); his vision included skyscrapers, and more crucially, apartment houses:

> In residential localities high apartments would build out to the street line and their windows would open on the grounds of private residences. A vacant unrestricted lot in a high-class residential district had a high exploitation value. After such a locality was exploited by a dozen apartment houses, the owners of the private residences would begin to move away. The locality would become depressed and the apartment houses themselves would sometimes find themselves in a blighted district.[11]

Bassett felt that these "chaotic conditions" were due to the inability of the individual to protect himself. Obviously, the "high-class" single-family dwelling unit stood at the apex of his hierarchy of values, and the entire SZEA reflects his fervid concern to protect the land values of wealthier neighbors.

From 1916 to 1926, the advocates of zoning fought a vigorous battle for its judicial recognition. Many

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[11] *Id.*

states considered, and a few adopted,[12] constitutional amendments to permit zoning, but the very real possibility remained that the Supreme Court might interpret this as an unconstitutional use of state power under the Fourteenth Amendment.

The power to zone was finally validated by this Court in the now famous *Euclid* case.[13] It is critical to remember that this Court in *Euclid* did *not* have before it a question involving the application of a zoning ordinance *to a specific piece of property, as occurs in this case.* At stake was simply the constitutional power to "*zone*", and the Court was generally concerned with the generic basis of land use allocation which the Euclid ordinance had adopted. At issue was the "comprehensive plan" of use districts and blanket restrictions *imposed throughout the city* by local government, a scheme which happened to incorporate the hierarchal land use pattern described above. This Court held 6-3 in favor of validity, *after a rehearing* in which it reversed its initial conclusion that zoning was an unconstitutional interference with property.[14]

Even so, this Court did not expressly sanction the system which gave the single family dwelling unit a preferred and protected legal position. Rather, the con-

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[12] A provision authorizing the General Assembly to grant authority to cities to pass zoning and planning laws was first included in the Constitution of Georgia in 1928 (Acts 1927, pp. 127, 128, ratified Nov. 6, 1928). See Ga. Const. art 3, §2-1923 (1945).

[13] Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[14] See McCormack, A Law Clerk's Recollections, 46 Colum. L. Rev. 710 (1946).

stitutionality of such ordinances was placed on very different grounds:

> [i]t must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare. [Citations omitted]. 272 U.S. at 395.

That is to say, a zoning ordinance is constitutional only when it serves the *public* interest, and not necessarily if the enactment works merely to protect other *PRIVATE* property rights.

One feature of Euclid's comprehensive plan gave this Court great difficulty; namely, the creation of exclusive residential districts from which apartments were excluded. The problem was that nuisance law had not recognized the differences between single family homes and apartments to the point that it was willing to exclude apartments in single family residential areas.[15] Nonetheless, borrowing heavily from nuisance analogies, it adopted Bassett's view of apartments totally:

> With particular reference to apartment houses it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed

[15] See Mandelker, The Zoning Dilemma, 34 (1971).

> in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of quiet and open spaces for play, enjoyed by those in more favored localities — until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. *Under these circumstances*, apartment houses, . . . come very near to being nuisances. 272 U.S. at 394, 395 (emphasis added).

Note the assumption that all apartments are multistoried monsters, virtually blocking out light and air; that people who live in apartments do not have children who will be menaced by moving cars; and that all parking will be on-street. Quite obviously, the modern trend toward development of small, widely scattered, garden-type apartments was virtually unknown in 1926.

Still the power to zone was upheld, and the scope of review of *comprehensive* plans and ordinances was sharply narrowed by the Court's adoption of a presumption of constitutionality:

> If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control. 272 U.S. at 388.

The only other significant Court pronouncement on zoning to this date came shortly afterward in *Nectow v. City of Cambridge*,[16] decided in 1928. Although the ordinance in question was of the same general character seen in *Euclid*, the attack in *Nectow* was *NOT based on the overall validity of the measure itself*, which was conceded to be constitutional within the meaning of *Euclid*, but rather *as it was applied to the specific piece of property owned by the plaintiffs.* The appeal was from a Massachusetts decision upholding an ordinance which failed to take into account sensitive differences between the plaintiffs' land and others' nearby. This Court took jurisdiction, and *reviewed* the decision *on the merits*, holding that *the ORDINANCE WAS UNCONSTITUTIONAL AS APPLIED* because it did not bear a substantial relation to the public health, safety, welfare and morals.[17] Plainly, the Court felt the situation in *Nectow* was one which was clearly proper for judicial review, thus distinguishing the case which makes a broad attack on the constitutionality of an ordinance as a whole from the one where the claim is that the ordinance is unconstitutional as applied. It is equally clear that the Court intended only the former class of cases to be substantially cloaked from judicial review by the presumption of constitutionality; in the latter instances courts not only would, but should, scru-

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[16] 277 U.S. 183 (1928).
[17] See 277 U.S. at 188.

tinize challenges to decisions made by the local authority as they applied to individual parcels of land.

After the *Euclid* decision, the SZEA was enacted in practically every state in the union. Its familiar framework included a grant of power provision for use districts; a body called the Zoning Commission, which was to lay out broad rules, and another called the Board of Adjustment, to take care of any wrinkles in the plan; three procedures for change — two administrative, and one presumptively legislative; and finally, enforcement procedures and remedies.[18] In 1928, Georgia approved a constitutional amendment giving its cities and counties the power to zone, and later enacted two statutes spelling out the plan in greater detail — one for municipalities, see Ga. Code Ann. § 69-301 et seq., and another for the unincorporated area of counties, see Ga. Code Ann. § 69-1207 et seq. In addition the 1966 amendment to the Georgia Constitution, known as the "Home Rule for Counties" Amendment (Ga. Code Ann. § 2-8402 *et seq.*) specifically empowers the governing authority of each county "to enact for unincorporated areas appropriate planning and zoning ordinances for public safety, historic, health, business, residential, and recreational purposes." Ga. Code Ann. § 2-8404. See Johnson v. Hicks, 225 Ga. 576, 580 (1969).

2. *How the plan actually functions; or "coping with the dynamics of real life."*

The SZEA ordinances, such as the Zoning Reso-

[18] See Standard State Zoning Enabling Act (SZEA), (U.S. Dept. of Commerce rev. ed. 1926).

lution of Gwinnett County, envision a plan which is designed to give property owners a maximum amount of predictability and notice concerning land uses in the future. The central idea behind the act is a plan for the end-state of the community. Each community is to set down in minute detail rules for the "nth stage" of development into the future. Such a plan should be so detailed and comprehensive that the rules are practically self-administering: the finished blueprint should be predictable and basically static.

The notion of a detailed "comprehensive plan", with self-administering rules stated in advance of development has for a number of reasons turned out in reality to be a total impossibility. First, *the local zoning authority cannot force the assembly of land.* Thus, no matter how elaborately it maps out a plan for the future, ultimately developers in the private sector are left with the decision whether to build *OR NOT.* The governing body might think a particular area is suited for building apartments, but if no one in the market place thinks so, or if the present owner refuses to sell the tract, *no apartments will ever be built.* The irony is that *the plan actually works against development;* both, because its *creation of artificial scarcities* encourage favored landowners *not* to sell in the hope that the value will continue to appreciate, and also, because the more detailed the plan gets *the less attractive it becomes* to the prospective developer who will not build if there are too many restrictions.

A second and corollary reason that the plan has failed is that *the government cannot prevent the disassembly of land.* Property owners are still free to divide their land by will, leaving odd parcels to de-

scendants, thereby corroding the grand scheme envisaged perhaps years hence — perhaps tomorrow.

A third reason of enormous significance is that *zoning has in fact evolved into a quota system for various land uses,* which overtly operates to deprive one landowner of permitted development rights by allowing another to preempt him. This completely contradicts the notion that zoning involves a plan to perpetuity restricting land only in the interest of the *public* health, safety, welfare and morals, and indicates in reality that zoning has in fact degenerated from a plan for the future *INTO A SYSTEM OF RULES FOR HANDING OUT PRIVILEGES;* it is a system which creates open space and makes people pay for it. It has become a *presently* operating plan — no *re*zoning — no development.

The problem is that communities enacting zoning ordinances have assumed that the plan must consist of detailed blueprints with all the buildings set out instead of merely a set of rules for constructing a city in the future. The 1920ish notion that a legislative body should set forth all the rules into the indefinite future in exacting detail with no chance for the intervention or further exercise of discretion is, upon reflection, wrong. As Professor Krasnowiecki says, "It is a concept of land use control that is not consonant with reality."[19]

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[19] See "Kras: Father of the PUD in the U.S.A.", University of Pennsylvania Law Alumni Journal, p. 7 (Fall 1971). Other fallacies which Krasnowiecki sees inherent in the old zoning notion are (1) communities get "totally swamped" because their 20-year projections of planned growth can be arbitrarily telescoped into a span as short as two years,

Now in fact the Georgia courts have come to realize that the comprehensive plan cannot be static. The *Kirkpatrick* court, *supra*, recognized this when it held that the power to zone included the power to rezone. Similarly, in *Vulcan Materials Co. v. Griffith*, 215 Ga. 811, 114 S.E.2d 29 (1960), overruling *Neal v. Atlanta*, 212 Ga. 687, 94 S.E.2d 867 (1956), the court held that the laws of Georgia specifically authorize "spot zoning"; that is, the process of lifting out one unit or one particular piece of property from a zoned area and rezoning it for a different use. These decisions by the Georgia courts serve to reconcile the gap between the theory and practice of zoning, as discussed earlier, by allowing the system to operate with greater flexibility, and *they vigorously dispute the idea that such judgments are in any way "legislative" in character, and insist that such step-by-step activities involve highly discretionary judgments concerning INDIVIDUAL property owners*, which must be safeguarded by the panoply of due process guaranteed to citizens by the 14th Amendment to the U.S. Constitution.

To some extent, the zoning ordinance itself recognizes the need for change as well. Article XVII of the Gwinnett County Zoning Resolution provides for amendments of zoning provisions, and in doing so makes a grant of *administrative* power to the zoning commission when it stipulates that:

"This Resolution . . . *may* be amended from time

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with development occurring "all at once", and (2) the concept deals only with the physical control of land and does not admit to dealing with developers (or owners) on a *personal* basis, an idea which is utterly belied by reality.

to time. . . ." The ordinance tries to insulate these obviously *discretionary* activities from judicial review by giving the local legislative body the power to decide, but such a maneuver cannot conceal the fact that *THE FUNCTION SERVED IS ESSENTIALLY JUDICIAL* in nature and very nearly identical to the purpose served by the Board of Appeals, which is clearly an administrative body.

The whole problem with the amendment mechanism is that it opens up a big hole in the scheme, and completely negates the idea that it is a plan for the future governed by broad impersonal rules. Not only does it break down the concept of predictability, it sets up an impossible dilemma, because *a constantly changing plan is tantamount to no plan at all.*

In response to this quandry, zoning commissions have developed two techniques to try to solve the problem. In a small number of communities, all land has been zoned "above the market"; that is to say, the commission has enacted ordinances with few restrictions which mean that a wide variety of uses is allowed everywhere, and developers are free to develop land within certain broad limitations. The commission exercises *control* over the development plan by rezoning individual parcels upward just before the developer starts to build, if it does not happen to like what he has in mind. Courts have traditionally taken a dim view of this technique of slamming the door on an applicant. For example, in *Commercial Properties, Inc. v. Peternel*, 418 Pa. 304, 211 A.2d 514 (1965), the zoning authority allowed a developer to proceed, first requesting preliminary site plans, then a grading permit, then more specific plans, then a building permit

and so on. After allowing him to proceed several months, it suddenly passed an ordinance rezoning *only his property* in order to preclude development altogether. The Pennsylvania court predictably invalidated the zoning ordinance upon finding it to be special legislation, discriminatory, arbitrary, and unreasonable. See also, *Andgar Associates, Inc. v. Board of Zoning Appeals*, 30 A.D. 2d 672, 291 N.Y.S.2d 991 (1968); *People v. County Cook*, 50 Ill. App. 2d 436, 206 N.E.2d 436 (1965).

The judicial trend seen in *Peternel* has forced the vast majority of zoning commissions to resort to the second technique: zoning just *below* the level of probable development. This forces a property owner into a somewhat more difficult legal position than the *Peternel* litigants faced; but as a control technique it operates in much the same way as the procedure condemned by the Pennsylvania court in that case. Here, the zoning ordinance is made so restrictive that almost no one would want to develop under the stated rules; it is a system based on an extremely comprehensive plan which actually regulates at a level just below the level at which development can occur. Therefore, development is only *really* permitted through all kinds of changes — variances, special exceptions, and amendments. *The result is that most development has occurred not in accordance with pre-established rules, but rather with change at the threshold of development.* In an important study recently released, entitled "Building The American City: Report of the National Commission on Urban Problems to the Congress and to the President of the United States", House Document No. 91-34 91st Congress, 1st Session (Paul H. Douglas, Chairman), a blue-rib-

bon Presidential Commission describes the situation as follows:

> The "wait and see" approach to regulations represents a change in the administrative procedure applied to proposed development. In place of the older "self-executing" regulations, the approach contemplates *discretionary* public review of development proposals shortly before development occurs. In essence, the traditional administrative process in zoning is giving way to the more general standards and administrative discretion traditional in subdivision regulations. *The developer proposes, and the municipality disposes.* Sometimes the process is guided by useful plans and standards, but often not. *Increasing reliance on discretionary review* may well represent a more fundamental change in land use regulations than any changes in substantive requirements. *Building The American City* at 206. (emphasis added)

Typically, the developer comes with a proposal which, *in the absence of any standards* (in fact the situation in Gwinnett County), may very likely be decided arbitrarily according to the whim and taste of the local zoning authority. This, of course, is not consistent with the notion of "legislative" action — the amendment *does not* apply to all. Amendments are virtually always a response to a solicited proposal pertaining to an individual piece of property. Administered in this way, zoning amendments are handled by the local governing authority on a case-by-case basis considering requests from property owners seeking relief from existing, overly restrictive zoning ordinances

which rarely if ever bear any proven relation to the health, safety, welfare or morals of the community.

Thus an amendment is just like a variance or a special exception except that it is issued by the local governing authority instead of the Board of Appeals.

Amendments now occur more or less instantaneously, giving short notice, and as such, represent *the complete antithesis of the theory of a set of impersonal rules disposing of everyone's welfare impartially.*

The problem is, this evolution has gone on largely unnoticed by a substantial number of courts, who continue to treat the myths of the SZEA as if they were still operative.

The chief myth is the idea that a local zoning authority is a *legislative body* which merely enacts broad, impersonal, self-executing rules. The reality of the situation described above utterly belies this concept. Even Bassett was afraid of what courts might think of case-by-case "piecemeal" zoning:

> Comprehensive zoning of an entire city is strong because localities substantially similarly situated are treated alike. Piecemeal zoning is weak because it is discriminatory. Piecemeal zoning is apt to produce test cases full of danger because, for instance, an owner of a vacant lot is prevented from building a garage in one residential locality when a similar owner in a similar locality ten blocks away is allowed to build a garage. *This is discriminatory on its face and is likely to incur the criticism of the courts.*[20]

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[20] Bassett, *supra* at 320.